

D.U.P. No. 2004-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NEW JERSEY TRANSIT AND
ATU DIVISION 819,

Respondents,

-and-

Docket No. CI-2004-003

TERRY GRAY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Terry Gray against New Jersey Transit and ATU Division 819. Gray alleged that New Jersey Transit terminated him from employment in violation of N.J.S.A. 34:13A-5.4a(1) and (3), when it terminated him after an arbitrator decided Gray received and transmitted pornographic material via company e-mail in violation of various NJT policies. Gray further alleged that ATU failed to properly represent him in connection with his termination, in violation of N.J.S.A. 34:13A-5.4b(1) and (3). The Director found that Gray's allegations against both ATU and New Jersey Transit were outside the Commission's six month statute of limitations. The Director further found that even if the charge was timely filed, Gray's charge failed to establish that he was terminated for reasons protected by the Act or that ATU breached its duty of fair representation.

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Appearances:

For the Respondent - New Jersey Transit,
Peter Harvey, Attorney General
(David S. Griffiths, Deputy Attorney General)

For the Respondent - ATU,
Craner, Satkin & Scheer, attorneys
(John A. Craner, of counsel)

For the Charging Party,
Terry Gray, pro se

REFUSAL TO ISSUE COMPLAINT

On July 22, and August 7, 2003, Terry Gray, a former employee of New Jersey Transit (NJT), filed an unfair practice charge and amended charge against NJT and Amalgamated Transit Union Division 819 (ATU), Gray's former employee representative. Gray alleges that NJT terminated him from his employment in violation of N.J.S.A. 34:13A-5.4a(1) and (3)^{1/}. Gray alleges

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)

that ATU failed to properly represent him in connection with his termination, in violation of N.J.S.A. 34:13A-5.4b(1) and (3).^{2/}

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. By letter of March 23, 2004, I advised the parties that I did not intend to issue a Complaint on any of the allegations as set forth in the charge, and I explained the basis for that conclusion. I provided the parties with an opportunity to respond. Neither New Jersey Transit nor ATU filed a response.

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act, and (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

On April 2, 2004, Terry Gray filed a response. Citing National Labor Relations Board case law, Gray argues that the unfair practice charge should not be dismissed because "the union (ATU 819) and NJ Transit withheld this case for a long period of time...(causing) unreasonable delay and hardship that interfered with or restrained (Gray) to exercise his/her rights under the law."

Based upon the following, I find that the complaint issuance standard has not been met.

Terry Gray was employed by NJT for approximately 21 years as a senior traveling auditor. On February 21, 2001, Gray was charged with disciplinary action for allegedly receiving and transmitting pornographic material via company e-mail in violation of various NJT policies, and immediately terminated from his employment with New Jersey Transit.^{3/} Approximately 30 New Jersey Transit employees were investigated in connection with the e-mail incident. Ultimately, seven employees received disciplinary charges in December 2000; the disciplinary charges against Gray were issued on February 21, 2001.

3/ The disciplinary notice read as follows:

Terry Gray is in violation of the following: (1) N.J. Transit Corporate-Wide Policy 3.09 - Equal Employment Opportunity Policy; (2) NJ Transit Diversity Policy Statement; (3) Policy 8.01 - Control and use of Computer Hardware and Software; (4) Policy 8,04 Use of Internet and Email; (5) July 7, 1999 letter of Instruction from acting Executive Director Rosenblum.

New Jersey Transit and ATU were parties to a collective bargaining agreement effective from July 1, 1999 through June 30, 2002. Section 1, Article A of the agreement, the grievance procedure, provided for binding arbitration. Arbitration hearings were conducted regarding Gray's discharge on February 8, July 11 and October 18, 2002, before an arbitration board composed of John Costa, President of ATU Div. 819; David McDaid, Director of Labor Relations for NJ Transit Bus Operations, and Wendi F. Weill, a neutral Arbitrator. Counsel for ATU represented Gray in the arbitration proceedings. ATU argued on Gray's behalf that the disciplinary charges should be dismissed because NJT did not serve Gray with the disciplinary charges within 72 hours of the date of the offense, as required by the parties' collective agreement; that there was no evidence that Gray violated any of NJT's sexual harassment policies; and that discharge was too severe a penalty for the disciplinary charges.

On January 14, 2003 Costa signed the opinion and award before notary public Rosalyn West. On January 22, 2003, McDaid and Weill executed the opinion and award before notary public David Simon. On or about January 24, 2003, Gray received the Opinion and Award upholding his termination on the disciplinary charges.

In his unfair practice charge, Gray alleges that the arbitration award which confirmed his termination was incorrect and contained numerous errors. Gray alleges that NJT and ATU

falsely accused him of offenses and engaged in "deception" to deprive Gray of his employment with New Jersey Transit. Gray additionally alleged that the two notaries who signed the arbitration award did not use their state seals to do so, and that the notary who attested to the documentation was present during the entire hearing (constituting) a "conflict of interest." Gray requests that NJT and ATU be reprimanded for their actions, that Gray be awarded backpay, that both notaries be suspended from their entitlements and that Gray receive an apology from both NJT and ATU.

In the amended charge, Gray alleges that he did not receive a similar penalty as other employees who were charged with the same offense; that ATU and NJT "prolonged the decision process" on Gray's termination by taking approximately one year to schedule the February 2002 arbitration hearing; that Gray did not receive the arbitration decision until ten months later; and that Gray was "restrained and prevented" from filing the unfair practice charge until he received the arbitrator's decision on January 24, 2003. Gray further alleges that he was:

"discriminated in regards to my tenure of employment because I did not sign the consent form of the terms and conditions and therefore I was denied my employment (terminated)."

At an exploratory conference conducted by a Commission staff agent on October 8, 2003, Gray further alleged that the arbitrator's award was incorrect because Gray did not receive the disciplinary charges within 72 hours of the date of the offense, as required by the parties' collective agreement.

In response to the unfair practice charge, ATU submits that Gray's charge fails to raise allegations that ATU violated the Act. ATU further submits that the other employees who received discipline as a result of the e-mail incident were offered and accepted terms of settlement of the discipline which included thirty-day suspensions; that Gray was offered the same resolution but refused and requested that ATU pursue his termination to arbitration which it did; and that any delay in the scheduling of the arbitration was due to the availability of the arbitrators and deputy attorney general who represents New Jersey Transit. ATU further argues that since Gray failed to file the unfair practice charge within six months of his termination, the charge is untimely.

NJ Transit submits that the unfair practice charge fails to adequately allege it violated the Act.

For the following reasons, the unfair practice charge does not meet the Commission's complaint issuance standard and must be dismissed.

ANALYSIS

The Act requires that an unfair practice charge be filed within six months of the date the unfair practice occurred.

N.J.S.A. 34:13A-5.4c states, in relevant part:

no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The statute of limitations normally begins from the date the alleged unfair labor practice occurred, provided the person(s) affected are aware of the action. The date of the action is known as the "operative date," and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must be filed within six months of the operative date. Charges filed after that date are generally untimely unless the Charging Party demonstrates that it was "prevented" from filing the charge prior to the expiration of the limitations period.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek vs. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to pursue their litigation diligently and to prevent the litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable

considerations in deciding whether a charging party slept on its rights. But the Court still expected charging parties to diligently pursue their claims.

Here, Gray was terminated from employment with New Jersey Transit effective February 21, 2001. Gray did not file the unfair practice charge until August 7, 2003, well over two years later. Gray argues that he could not have filed the unfair practice charge until he received the arbitrator's final decision on his termination on January 24, 2003. Gray further argues that he was prevented from filing a timely charge due to "unreasonable delay" by ATU and NJ Transit in completing the arbitration process. However, the filing of a grievance does not toll the statute of limitations for the filing of an unfair practice charge. State of New Jersey (Stockton State College), P.E.R.C. No. 77-14, 2 NJPER 308 (1977). Therefore, any delay in the completion of the arbitration hearing did not lengthen the limitations period.

Moreover, even if the limitations period were counted from the date Gray received the arbitration decision, Gray did not file a perfected unfair practice charge until more than six months after that date.^{4/}

^{4/} In support of his argument that he was prevented from filing an unfair practice charge due to delay by NJ Transit and ATU, Gray cites decisions of the Third Circuit Court of Appeals and the United States Supreme Court in N.L.R.B. v.

Based upon the foregoing, I find that Gray's allegations against both ATU and New Jersey Transit are outside of the Commission's statute of limitations. Therefore, no complaint may issue on those allegations and I dismiss the charge. N.J.S.A. 34:13A-5.4c). Kaczmarek; No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977).

However, even if the charge had been timely filed, I find no basis to issue a Complaint against NJT. The essence of Gray's charge against NJT is that it wrongfully terminated him in violation of the ATU contract. An arbitrator having considered Gray's claim in a binding format, this Commission cannot now permit him to relitigate his termination here. See County of Mercer (Cooks), D.U.P. NO. 2003-4, 29 NJPER 83 (¶23 2002); Hudson County Department of Corrections (Dowling), D.U.P. No. 2001-12, 27 NJPER 64 (¶32028 2000). Moreover, in the absence of

4/ (...continued)
Industrial Union of Marine and Shipbuilding Workers of American, AFL-CIO, Local 22, 379 F.2d 702, (3rd Cir. 1967), cert. granted 88 S. Ct. 781, 389 U.S. 1034, 19 L.Ed.2d 821, reversed 391 U.S. 418; 88 S. Ct. 1717; 20 L.Ed.2d 706 (1968). In that case, the U.S. Supreme Court enforced an order of the National Labor Relations Board ordering a union to reinstate a member it had expelled from membership without first exhausting internal union procedures under the union constitution, and held that the member could file an unfair practice charge against the union without first exhausting those procedures. This case does not pertain to the allegations concerning timeliness and/or breach of the duty of fair representation raised by Gray's charge.

5.4a(3) claims that the employer's adverse personnel action was motivated by the employee's exercise of rights protected by our Act, we ordinarily do not have jurisdiction to hear wrongful termination claims. In re Bridgewater Tp., 95 N.J. 235 (1984). Accordingly, I decline to issue a Complaint based on Gray's allegations against NJT.

Moreover, even if timely, Gray's charge fails to establish that ATU breached its duty of fair representation. Section 5.3 of the Act empowers an employee representative to represent employees in the negotiations and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60,10 NJPER 12 (¶15007 1983).

A union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. OPEIU Local 153 (Johnstone), Mackaronis and Middlesex Cty. and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd. App. Div. Docket No. A-1455-80 (4/1/82), certif. den. 91 N.J. 242 (1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); and AFSCME Council No. 1 (Banks), P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

In this case, ATU represented Gray before the employer concerning his disciplinary charges, negotiated settlement terms which could have avoided his termination, and took the case to arbitration on his behalf when he declined to settle. The fact that Gray exercised his prerogative not to accept the settlement ATU negotiated on his behalf, choosing instead to proceed to an arbitration in which he did not prevail, does not establish a violation of the Act.

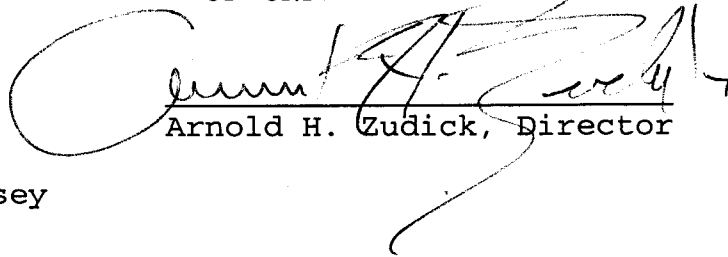
As to Gray's claims that the notarized signatures of the arbitration panel members were defective, and that the arbitration decision contained erroneous facts, this Commission does not have jurisdiction over these issues. Therefore, I find

that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{5/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: April 30, 2004
Trenton, New Jersey